IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BLUE CROSS AND BLUE SHIELD OF GEORGIA, INC., ET AL., Plaintiffs, v. DL INVESTMENT HOLDINGS, LLC f/k/a DURALL CAPITAL HOLDINGS, LLC d/b/a CHESTATEE REGIONAL HOSPITAL; RELIANCE LABORATORY TESTING, INC.; MEDIVANCE BILLING SERVICE, INC.; AARON DURALL; JORGE PEREZ; and NEISHA CARTER ZAFFUTO, Defendants.	CIVIL ACTION FILE NO. 1:18-cv-01304-MLB

THE HOSPITAL DEFENDANTS' CONSOLIDATED OPPOSITION TO PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND MOTION FOR EXPEDITED DISCOVERY

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Defendant DL Investment Holdings, LLC d/b/a Chestatee Regional Hospital ("Chestatee"), Reliance Laboratory Testing, Inc. ("Reliance"), Aaron Durall, Medivance Billing Service, Inc. ("Medivance"), and Neisha Carter Zaffuto (collectively, the "Hospital Defendants") respectfully submit this consolidated response in opposition to (1) Plaintiffs' motion for a temporary restraining order ("TRO") and preliminary injunction seeking a broad freeze of all Defendants' assets (the "Asset Freeze Motion"), (2) Plaintiffs' motion for an order to preserve evidence ("Extraordinary Preservation Motion"),[1] and (3) Plaintiffs' motion for expedited discovery ("Expedited Discovery Motion").[2]

INTRODUCTION

No matter how many times Plaintiffs try to spin it, this case involves no fraud and no conspiracy. Instead, this is the story of a fledgling, rural medical provider, Chestatee Regional Hospital ("Chestatee"), that, with the help of Aaron Durall, used one of the few resources it had to increase its revenue in an effort to stay open. Under contracts with Blue Cross and Blue Shield of Georgia, Inc. ("BCBS Georgia"), Chestatee provided medically necessary urinary drug screening

[1] The Asset Freeze Motion and Extraordinary Preservation Motion are filed together as Doc. 46.

[2] Doc. 48. The Hospital Defendants do not oppose Plaintiffs' motion to seal (Doc. 47).

services to BCBS enrollees and submitted claims to BCBS Georgia for those services. BCBS Georgia then paid for those services, with each payment going into Chestatee's general account.

Plaintiffs now seek to freeze *all* of all the Defendants' assets in the hope that one day, they will recoup the entire amount paid for these legitimate laboratory claims. This demand that the Court freeze Defendants' assets merely to preserve a hypothetical future money judgment is prohibited by controlling case law in this Circuit. Asset freezes are only permissible in the rare cases in which (1) the freeze would apply to a specific corpus of funds still in existence, (2) the plaintiff has established a viable equitable claim to the funds, (3) the plaintiff is likely to succeed on the merits of the equitable claim, and (4) the plaintiff has acted diligently in pursuing the remedy.

Plaintiffs are not entitled to the extraordinary relief of an immediate freeze of all Defendants' assets because all of the alleged overpayments Plaintiffs seek to recover in this action were commingled with Chestatee's general operating funds, and there has never been an identifiable corpus of funds that Plaintiffs could freeze. Plaintiffs have failed to demonstrate even that they have a viable equitable claim, much less that they are substantially likely to prevail on the merits of that claim. Finally, over a year ago, Plaintiffs knew substantially all of the same facts

they rely on now in support of their Asset Freeze Motion, demonstrating that there is no exigency here to support their extraordinary request for relief.

Plaintiffs also ask the Court to enter an order warning the Hospital Defendants of their obligations to preserve evidence. Courts consistently decline to grant such requests, and this Court should do the same here because Plaintiffs have presented no evidence to support an unfounded assumption that relevant evidence in the Hospital Defendants' control will be lost or destroyed.

Finally, Plaintiffs ask this Court to deviate from its local rules and authorize expedited discovery, even though no answer has been filed, so they can somehow establish a need for an asset freeze and justify their demand for an order preserving evidence. But no amount of discovery will change the fact that there was never a corpus of funds that Plaintiffs could have frozen. Nor will discovery cure their failure to exercise reasonable diligence by waiting more than a year before seeking such extraordinary purportedly time-sensitive relief. And discovery is unnecessary at this stage to determine whether the Hospital Defendants have complied with their evidentiary preservation obligations because Plaintiffs have offered no evidence to suggest that they have not. For these reasons, Plaintiffs' motions should be denied.

FACTS

Plaintiffs tell a story that is divorced from the facts and based largely on the hyperbolic and sometimes salacious allegations of Kelly Smallwood, a disgruntled former employee who unsuccessfully sued Chestatee for the same alleged billing practices at issue in this case. And many of the Plaintiffs' purported facts are simply false.[3] Plaintiffs also rely on the declaration of a BCBS investigator, John Iacovelli, who reaches bold conclusions based on double and sometimes triple hearsay. Plaintiffs even accuse Reliance of engaging in illegal kickbacks based largely on a CBS News story that does not even mention Reliance.[4] Nonetheless, most of the "facts" in Plaintiffs' recitation are simply irrelevant to the questions

[3] *Compare, e.g.* Declaration of Kelly Smallwood ("Smallwood Decl.") ¶ 15 (asserting without foundation that Jorge Perez was "involved with managing Chestatee's operations, including the billing for laboratory tests") and *id.* ¶ 18 (stating that Mr. Durall and Ms. Zaffuto relied on Jorge Perez to help solve issues that arose), *with* Zini Decl. ¶¶ 12-13 (testifying that she had no recollection of Perez having any formal role or actual authority at the hospital); *see also id.* ¶ 10 (testifying that Ms. Smallwood was not involved in any of the hospital's clinical laboratory functions). Declaration of Lisa Zini ("Zini Decl.") (Doc. 46-3), attached hereto as Exhibit A.

[4] Memoorandum of Law in Support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction ("Asset Freeze Br.") (Doc. 46-1) at 9 and n.23. Plaintiffs erroneously say that a former employee "confirmed" that Reliance engaged in kickbacks. *Id.* at 9-10. The unsubstantiated and unreliable evidence Plaintiffs proffer—an unnamed former employee's "belie[f]" that Reliance "was in a position to pay" (Iacovelli Decl. ¶ 67(v))—is far from sufficient to draw the conclusion that Reliance engaged in illegal kickbacks. Declaration of John Iacovelli ("Iacovelli Decl.") (Doc. 46-2).

before this Court.[5] The relevant (and accurate) facts for purposes of the pending Motions are set forth below.

I. Chestatee has long billed insurers, and has been paid, for the type of laboratory services that Plaintiffs now contend were fraudulent.

Long before Aaron Durall and Reliance, Chestatee openly engaged in the very practices that Plaintiffs now contend constitute rampant fraud. According to Lisa Zini, Chestatee's laboratory manager who has worked in the hospital's laboratory for sixteen years, Chestatee consistently conducted tests ordered by physicians employed outside of the hospital for patients receiving care in their homes or facilities entirely unrelated to Chestatee or its affiliated clinics.[6] Examples of such laboratory tests include tests ordered for residents at skilled nursing facilities and patients of home health agencies.[7] In an average year prior to 2016, Chestatee's laboratory received and performed hundreds of tests ordered for patients who had received no care at, or from, Chestatee in connection with the

[5] *E.g.* Smallwood Decl. ¶ 12 (erroneously stating that Mr. Durall "often" took a private plane to visit Chestatee).

[6] Zini Decl. ¶ 5; *see also* Declaration of Aaron Durall ("Durall Decl."), attached hereto as Exhibit B ¶ 15.

[7] Zini Decl. ¶ 5.

tests.[8] And Chestatee issued bills to insurance companies and other payors for these tests.[9]

Chestatee also routinely sent specimens to independent reference laboratories when the hospital's laboratory department was incapable of performing the ordered test or the test could simply be more efficiently performed elsewhere.[10] Other than Chestatee's work with Reliance Laboratory, the independent reference laboratory Chestatee has most commonly used for such testing over the last decade is a Quest Diagnostics ("Quest") facility in Tucker, Georgia.[11] Just as with tests performed at Chestatee, Chestatee has historically issued bills to, and received payment from, insurance companies and other payors for tests performed by outside labs at Chestatee's request.[12]

II. Aaron Durall purchased and revitalized Chestatee.

In 2016, Chestatee Regional Hospital was struggling financially and on the verge of closing.[13] Aaron Durall purchased the hospital through his company

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[8] *Id.*

[9] *Id.* ¶ 7.

[10] *Id.* ¶ 6.

[11] *Id.*

[12] *Id.* ¶¶ 6-7.

[13] Durall Decl. ¶ 5.

Durall Capital Holdings, LLC ("Durall").[14] Shortly thereafter, he became the Chief Executive Officer of the hospital.[15] At least twice a month, Mr. Durall traveled from his home in Florida to Atlanta, and then commuted three or four days to the hospital in Dahlonega, Georgia.[16]

When Durall purchased the hospital, it had two chemistry analyzers used to run drug screens and analyze blood specimens.[17] These analyzers were fully-operational and capable of performing a high number of urine drug tests ("UDT").[18] Under Mr. Durall's leadership, Chestatee received a higher number of urine specimens from non-patients along with accompanying lab orders.[19] Chestatee's lab processed these orders and conducted these laboratory tests on site.[20] Ms. Zini testified that she is unaware of the Chestatee lab failing to conduct tests ordered on any urine specimens received by the hospital.[21] She also

[14] *Id.* ¶ 6; Iacovelli Decl. ¶¶ 5-6.

[15] Durall Decl. ¶ 7; Iacovelli Decl. ¶ 6.

[16] Durall Decl. ¶ 8.

[17] *Id.* ¶ 16.

[18] Zini Decl. ¶ 8.

[19] *Id.*

[20] *Id.*; *see also* Smallwood Decl. ¶ 30 (observing that Chestatee received volumes of urine for testing).

[21] Zini Decl. ¶ 8.

understands that the lab appropriately performed, recorded, and communicated results for every urine specimen it received.[22]

In early 2017, Chestatee received a new analyzer capable of running Twenty seven test "panels" on urine specimens.[23] Chestatee did not use this machine until it had been decontaminated and independently validated for accuracy and consistency.[24] By July 2017, this machine was up and running, and from then on, Chestatee primarily ran its UDTs on this new machine.[25]

The increase in laboratory tests resulted in a substantial increase in income for the hospital.[26] With this new capital, Mr. Durall hired more staff, including two hospitalists, to improve patient care.[27] The hospital also added services, including a drug abuse recovery center, which added jobs in the local community and assisted individuals in their quest to become drug free.[28] In response to desperate requests from long-time hospital staff, Mr. Durall invested several milliondollars

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[22] *Id.*

[23] *Id.* ¶ 9.

[24] *Id.* ¶ 10.

[25] *Id.* ¶¶ 9-10.

[26] Durall Decl. ¶ 15.

[27] *Id.* ¶ 9.

[28] *Id.* ¶ 10.

purchasing new equipment, including new beds, operating room equipment, and monitors, and installing new flooring in some of the hospital wings.[29]

III. BCBS Georgia conducted an audit of Chestatee's laboratory billing, discovered that Chestatee was billing for laboratory services conducted at Reliance, and continued to pay for those services anyway.

Shortly after Chestatee began increasing its claims for UDT in the fall of 2016, Anthem, Inc.'s Special Investigations Unit noticed the obvious spike in the volume of UDT Chestatee was billing to BCBS Georgia.[30] BCBS did not contact Chestatee to initiate an audit of its billing practices until February 2017.[31] The investigator, John Iacovelli, received the results of the audit in April 2017.[32] Based on the audit, he determined that Chestatee was billing for laboratory services performed at Reliance.[33]

On or about May 5, 2017, BCBS Georgia notified Chestatee by letter that it had completed its investigation.[34] The letter did not characterize Chestatee's billing practice as fraudulent.[35] Nor did BCBS Georgia demand the return of any

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[29] *Id.* ¶ 11.

[30] Iacovelli Decl. ¶ 21.

[31] *Id.* ¶ 29.

[32] *Id.* ¶ 39.

[33] *Id.* Ex. C at 2 (Doc. 46-2 at 31).

[34] Durall Decl. ¶ 19.

[35] *Id.* and Ex. B.

overpayments or notify Chestatee that its contract with BCBS Georgia would terminate.[36] Instead, BCBS Georgia simply told Chestatee it was placing it on "pre-payment review."[37] Under the pre-payment review process, Chestatee was directed to provide "medical records that support the billing of specific code(s)" for each UDT claim Chestatee submits for reimbursement.[38] BCBS Georgia explained that it would determine the "accuracy and correctness of the claim and/or the appropriateness of the service based on the submitted medical records and other relevant information."[39]

Beginning May 20, 2017, Chestatee complied fully with the pre-payment review program and submitted all of the required documentation.[40] From May 2017 through October 2017, BCBS Georgia continued to pay for Chestatee's laboratory claims, which continued to roll in at about the same volume.[41] And

[36] *See id.* Ex. B.

[37] Iacovelli Decl. ¶ 44; Durall Decl. Ex. B.

[38] Durall Decl. Ex. B at 1.

[39] *Id.*

[40] Durall Decl. ¶ 20.

[41] *Id.*

during these five months, BCBS Georgia continued paying UDT claims submitted by Chestatee at the same rates it had paid prior to imposing pre-payment review.[42]

In the summer of 2017, BCBS Georgia notified Chestatee that it would terminate the contract within 90 days unless Chestatee renegotiated its terms.[43] BCBS Georgia did not threaten to terminate the contract immediately under the provision of the contracts authorizing immediate termination for cause.[44] On or about November 1, 2017, the parties negotiated a lower fee schedule and executed a new contract.[45] At no point did anyone at BCBS Georgia accuse Chestatee, verbally or in writing, of fraud, including during the three months period during which the parties renegotiated the contract.[46]

IV. BCBS Georgia payments went into Chestatee's general operating fund.

All payments BCBS Georgia made to Chestatee after it was purchased in mid-2016 would have been deposited into Chestatee's depository account in the

[42] *Id.* ¶ 20; Declaration of Neisha Carter Zaffuto ("Zaffuto Decl.") attached here to as Exhibit C ¶ 7.

[43] Durall Decl. ¶ 21; Iacovelli Decl. ¶ 48.

[44] Durall Decl. ¶ 21; *see, e.g.*, Hospital Agreement for Preferred Provider Program (Doc. 28-3) at 15 § 11.3.

[45] Durall Decl. ¶ 22.

[46] *Id.*

ordinary course of business.[47] The funds were then transferred to Chestatee's general operating account that was used for making payments on behalf of Chestatee.[48] During any given month, in addition to deposits on payments received from BCBS Georgia, hundreds of deposits from other sources, including other insurance companies and patients, were also received and transferred to Chestatee's general operating account.[49] That account was used for paying salaries, taxes, and utilities, purchasing food for patients, equipment, and furniture, and paying other normal expenses of an operating hospital.[50] As a result, there was never a specific, identifiable fund at Chestatee comprised of proceeds from payments BCBS Georgia made for urine "screening tests" or any other tests.[51] There is certainly no such identifiable fund now.

[47] *Id.* ¶ 25.

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

ARGUMENT

I. The Court should deny Plaintiffs' Asset Freeze Motion.

Plaintiffs demand that the Court issue an "extraordinary" order freezing nearly all the Defendants' assets, based on unsupported speculation and hyperbolic accusations. This Court should deny the Asset Freeze Motion for three reasons.

First, courts lack authority to grant the type of demand Plaintiffs make because, despite couching their request as an equitable one, the remedy Plaintiffs ultimately seek—money damages—is legal in nature. It is well-established that an asset freeze cannot be ordered when the only remedy the plaintiff seeks is money damages. *Second*, even if the Court construed the remedies Plaintiffs seek as equitable, Plaintiffs cannot show they are substantially likely to succeed on the merits of these equitable claims. *Third*, Plaintiffs' delay, failure to pursue diligently the return of alleged overpayments, and failure to show any exigency warrants denial of their motion.

A. This Court cannot freeze the Hospital Defendants' general assets to ensure they are available to satisfy a potential judgment for money damages.

Plaintiffs are impermissibly seeking an equitable order freezing all of Defendants' assets when they only actually seek the remedy of money damages. As the Eleventh Circuit ruled in *Rosen v. Cascade International, Inc.,* "preliminary

injunctive relief freezing a defendant's assets in order to establish a fund with which to satisfy a potential judgment for money damages is simply not an appropriate exercise of a federal district court's authority."[52] Moreover, the Court cannot order an asset freeze unless the plaintiff can identify "the existence of specific funds subject to an injunction."[53] And yet, Plaintiffs here seek an order freezing *all* of the Defendants' assets to satisfy a potential money judgment, without identifying any specific fund. Such an order is simply impermissible.

Although Plaintiffs raise two "equitable" claims and purport to seek equitable relief in their Second Amended Complaint, Plaintiffs desired remedy—money damages—is legal in nature. The Eleventh Circuit has explained that "[c]ases in which the remedy sought is the recovery of money (whether as collection on a debt or as damages) do not fall within the jurisdiction of equity, … and the imposition of a constructive trust generally will not be the appropriate remedy."[54] Likewise, the Supreme Court has observed that, "[a]lmost invariably[,] suits seeking (whether by judgment, injunction, or declaration) to compel the

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[52] *Rosen v. Cascade Int'l, Inc.*, 21 F.3d 1520, 1530 (11th Cir. 1994); *accord Mitsubishi Int'l Corp. v. Cardinal Textile Sales, Inc.*, 14 F.3d 1507, 1519 (11th Cir. 1994).

[53] *Noventa Ocho LLC v. PBD Props. LLC*, 284 F. App'x 726, 728 (11th Cir. 2008)

[54] *Mitsubishi Int'l Corp. v. Cardinal Textile Sales, Inc.*, 14 F.3d 1507, 1518 (11th Cir. 1994).

defendant to pay a sum of money to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty."[55] The Eleventh Circuit also rejects attempts like Plaintiffs to seek a preliminary asset freeze to preserve a potential money judgment, simply by labeling the request as "equitable."[56] As one district court in this Circuit recently explained, "[t]here is nothing talismanic about pleading an equitable cause of action such that a court can ignore the essence of the remedy sought."[57]

Thus, this Court must determine whether the essence of the remedy Plaintiffs ultimately seek is legal or equitable in nature.[58] As described below, under both of their "equitable" claims, Plaintiffs seek only money damages and do not seek to attach specific, identifiable funds over which they have an equitable claim. Accordingly, the ultimate remedy Plaintiffs seek under both ERISA §

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[55] *Great-West Life & Annuity Ins. v. Knudson*, 534 U.S. 204, 210 (2002) (quotations, alterations and citation omitted).

[56] *See Mitsubishi*, 14 F. 3d at 1512.

[57] *Storehouse Credit Union, EK. For. v. Cusumano*, No. 6:10-CV-850, 2010 WL 11508264, at *7 (M.D. Fla. July 26, 2010).

[58] *See Mitsubishi*, 14 F.3d at 1520 (determining that despite claims of fraud and demands for equitable relief, the plaintiff's "claims in this case are essentially contractual in nature").

502(a)(1) and their unjust enrichment claim is not equitable, and thus, this Court cannot order an asset freeze.[59]

1. Plaintiffs seek legal, not equitable, relief on their ERISA § 502(a)(1) claim.

The Hospital Defendants moved to dismiss Plaintiffs' ERISA § 502(a)(3) claim under *Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan*, a 2016 Supreme Court case that Plaintiffs completely ignore in their Asset Freeze Motion, and for good reason.[60] *Montanile* forecloses their demand for an asset freeze in this case.

The Supreme Court in *Montanile* considered whether a plaintiff could pursue equitable remedies under ERISA § 502(a)(3), which authorizes plan fiduciaries to seek only "appropriate equitable relief" to redress an ERISA violation.[61] The Court explained that "whether the remedy a plaintiff seeks is legal or equitable depends on (1) the basis for the plaintiff's claim and (2) the nature of the underlying remedies sought."[62] Thus, as the Seventh Circuit recently

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[59] *Noventa Ocho LLC*, 284 F. App'x at 727 (holding that where the plaintiff "asks only for damages, a legal remedy," an order freezing assets is inappropriate).

[60] 136 S. Ct. 651 (2016)

[61] 29 U.S.C. § 1132(a)(3).

[62] *Montanile*, 136 S, Ct. at 657 (internal quotation marks omitted and alterations adopted).

recognized, "simply phrasing the request for relief in equitable terms—*e.g.*, restitution, unjust enrichment, an equitable lien—is not dispositive."[63]

In *Montanile*, an ERISA plan paid the medical expenses of a participant injured in a car accident. The participant later obtained a tort settlement sufficient to cover those expenses. The plan sought to recover the amount it paid from the settlement proceeds under a provision of the plan providing that "[a]mounts that have been recovered by a [participant] from another party are assets of the Plan."[64] The Court held that this language created an equitable lien when the participant received the settlement funds; thus, the basis for the fiduciary's claim was equitable.[65] But by the time the fiduciary brought suit, the participant may have dissipated the settlement funds.[66] If so, the Court explained, the plan's § 502(a)(3) claim fails because a plaintiff can "enforce an equitable lien only against specifically identified funds that remain in the defendant's possession."[67] If the plaintiff cannot identify specific funds or the funds are unavailable, the plaintiff

[63] *Cent. States, Se. & Sw. Areas Health & Welfare Fund by Bunte v. Am. Int'l Grp., Inc.*, 840 F.3d 448, 453 (7th Cir. 2016).
[64] 136 S. Ct. at 655.
[65] *Id.* at 658.
[66] *Id.*
[67] *Id.* at 658.

"[cannot] attach the defendant's general assets instead."[68] This is so even if the defendants' dissipation is "wrongful."[69]

Applying *Montanile*, courts routinely dismiss § 502(a)(3) claims where the purported identifiable funds were commingled with the defendant's general assets. In *Depot, Inc. v. Caring for Montanans, Inc.*, for example, an employer sued an ERISA plan insurer for the return of premiums paid in error.[70] According to the employer, the insurer assessed improper surcharges that it then kicked back to another entity.[71] The insurer also allegedly assessed charges without providing sufficient notice.[72] The court held that, under *Montanile*, it could not order restitution because the plaintiff failed to allege that the overcharges were "kept in a segregated account."[73] The court explained that it could not "enforce a right to or over the specific portion of the premium monies that went to kickbacks or

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[68] *Id.* at 659; *accord Great-West*, 534 U.S. at 214 ("[F]or restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession.").

[69] *Montanile*, 136 S. Ct. at 658.

[70] No. CV16-74-M-DLC, 2017 WL 3687339, at *1 (D. Mont. Feb. 14, 2017).

[71] *Id.*

[72] *Id.*

[73] *Id.* at *5.

unwanted insurance products."[74] "If restitution or disgorgement were to be ordered," the court reasoned, "it would necessarily be from a general fund, and it would be equivalent to money damages."[75] The court dismissed the § 502(a)(3) claim under Rule 12(b)(6).

Here, Plaintiffs *own* evidence shows that from the very beginning, the purported overpayments were not deposited into a segregated account that could be the subject of an asset freeze.[76] Plaintiffs offer the declaration of former employee and failed relator, Kelly Smallwood, who at the outset, admits that the payments for laboratory services went into Chestatee's general fund.[77] And Mr. Durall confirms that there was never a specific identified fund of BCBS laboratory claim payments.[78] And there certainly isn't such a fund now given that the funds have been commingled with others, used to pay various expenses, and thus dissipated.[79] That should end the inquiry and Plaintiffs' § 502(a)(3) claim.[80]

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[74] *Id.*

[75] *Id.*

[76] *See* Smallwood Decl. ¶¶ 53-54.

[77] *Id.*

[78] Durall Decl. ¶ 25.

[79] *Id.* ¶¶ 25-26.

[80] *See, e.g.*, *Depot, Inc.*, 2017 WL 3687339, at *5 ("Under *Montanile*, … a party cannot recover in equity unless the funds have been maintained in a segregated account."); *Sullivan-Mestecky v. Verizon Commc'ns Inc.*, No. 14-CV-1835

Plaintiffs, however, ignore this crucial fact and argue that they can nonetheless somehow identify specific funds based on Ms. Smallwood's unfounded belief that Mr. Durall transferred funds out of Chestatee's general fund into "five or six different accounts," which were "controlled by the Defendants."[81] Ms. Smallwood does not explain which defendants "controlled" these accounts or how she determined that the amounts transferred into them represented overpayments for laboratory services and not a portion of legitimate revenue.[82] Based on these facts, and these facts alone,[83] Plaintiffs contend that the "transfers are distinct corpora and include only the amounts at issue in this proceeding."[84] They go even further and state, without any evidentiary support, that "[t]hese accounts almost certainly … were made to compensate [defendants] for their

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(SJF)(AYS), 2016 WL 3676434, at *26 (E.D.N.Y. July 7, 2016); *see also Sheet Metal Workers Pension Tr. of N. California v. Trayer Eng'g Corp.*, No. 15-CV-04234-LB, 2016 WL 1745676, at *6 (N.D. Cal. May 3, 2016) (granting motion to dismiss a claim for restitution of "contributions that it allegedly paid by mistake" under the "identical term of § 502(a)(11)").

[81] Smallwood Decl. ¶¶ 56-57.

[82] *See id.* ¶ 58.

[83] Ms. Smallwood also says she recalls Mr. Durall "pick[ing] up checks at Chestatee" and bringing them to Florida, but she admits that she does not know what these checks were for. *Id.* ¶ 60. Plaintiffs do not rely on this statement in support of their argument.

[84] Asset Freeze Br. at 16.

conduct in furtherance of the scheme."[85] There is nothing "certain" about Ms. Smallwood's suppositions or the inferences Plaintiffs draw from them.

What *is* certain is that BCBS Georgia's payments for laboratory services were never placed in a segregated account. All such payments (for laboratory and other services) went into Chestatee's depository account and were then transferred into Chestatee's general operating account.[86] Also flowing into this operating account were deposits of payments received from hundreds of other sources, including other insurance companies and patients.[87] That account was used for paying salaries, taxes, and utilities, purchasing food for patients, equipment, and furniture, and paying other normal expenses of an operating hospital.[88] As a result, there was never a specific, identifiable fund at Chestatee comprised of proceeds from payments BCBS made for UDT or any other tests.[89]

Because Plaintiffs seek only the return of unidentified "overpayments" and nebulous "profits or income made by Defendants on those amounts"[90]— instead of

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[85] *Id.*

[86] Durall Decl. ¶ 25.

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] Second Amended Compl. (Doc. 28) ¶ 336.

a constructive trust over "specifically identified funds that remained in the defendant's possession"—their ERISA § 502(a)(3) fails as a matter of law and fails to provide a basis for the extraordinary remedy of a preliminary asset freeze.[91]

2. Plaintiffs' failure to identify specific funds dooms their effort to obtain an asset freeze related to their unjust enrichment claim.

Likewise, Plaintiffs' unjust enrichment claim does not support an order freezing all of the Defendants' assets. Just as under ERISA § 502(a)(1), a district court can only freeze assets in connection with a state law claim if the requester can identify "the existence of specific funds subject to an injunction."[92] And simply identifying "a specific amount of money to which [they] claim entitlement does not relieve [them] of the obligation to show the existence of specific funds subject to an injunction."[93] Here, Plaintiffs do not even identify a specific amount of money subject to their desired asset freeze, let alone the existence of specific

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[91] *Montanile*, 136 S. Ct. at 658; *see, e.g.*, *Depot*, No. 2017 WL 3687339, at *6.

[92] *Noventa Ocho*, 284 F. App'x at 728 (11th Cir. 2008) (applying Florida law). Like Florida, under Georgia law, a party cannot obtain an equitable lien unless it can identify specific property in the defendant's possession that is subject to lien. *See G. Ober & Sons Co. v. Cochran*, 118 Ga. 396 (1903). If the allegedly misappropriated funds were commingled with other funds, a plaintiff cannot obtain equitable relief. *Id.* at 398 ("[S]o that, if a trust fund became mingled and confused with other funds, it could not be separated and recovered by the person injured by the misappropriation.").

[93] *Id.*

funds subject to an injunction. Accordingly, the Court should deny Plaintiffs' extraordinary motion for an order freezing all defendants' assets.[94]

Plaintiffs' reliance on *TemPay, Inc. v. Biltres Staffing of Tampa Bay, LLC* is misplaced.[95] Unlike here, in *TemPay*, the parties *jointly* identified a *specific sum* of money that they agreed constituted money related to the underlying litigation: "[I]t is undisputed that the assets involved are directly related to the underlying action because the parties concede that the funds were paid by Plaintiffs to Defendants as a result of the alleged fraudulent scheme."[96]

Here, in contrast, the parties do not agree that any particular sum of money in any specific account is related to the alleged equitable claim of unjust enrichment. In fact, Plaintiffs have not even identified a specific amount to freeze, let alone a specific corpus of funds. Despite this failure, Plaintiffs demand that the

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[94] Moreover, the availability of adequate legal remedies forecloses Plaintiffs' demand for an asset freeze. *See Storehouse Credit Union*, 2010 WL 11508264, at *7 (holding that plaintiffs' available legal remedies were adequate and thus declining to freeze assets); *see also Charter Sch. Capital, Inc. v. N.E.W. Generation Preparatory High Sch. of Performing Arts, Inc.*, No. 15-CIV-60966, 2015 WL 11201180, at *3 (S.D. Fla. June 2, 2015) ("The test of the inadequacy of a remedy at law is whether a judgment could be obtained, not whether, once obtained it will be collectible." (applying Florida law) (internal quotation marks omitted)).

[95] 929 F. Supp. 2d 1255, 1260–61 (M.D. Fla. 2013).

[96] *Id.*

court freeze *all* "Assets" of each defendant, including "any legal or equitable interest in, right to, or claim to, any and all real and personal property" of the defendants.[97] The breadth of Plaintiffs' demand, without an effort to identify specific funds, is staggering.

This Court should not grant Plaintiffs' motion because, despite Plaintiffs characterization of their request as equitable in nature, they in fact seek an order freezing all the defendants' asset to satisfy a potential money judgment.

B. The Court should deny the Asset Freeze Motion because Plaintiffs are not substantially likely to prevail on the merits of their equitable claims.

The Supreme Court has repeatedly emphasized that preliminary injunctive relief is "an extraordinary remedy never awarded as of right."[98] "A district court may grant injunctive relief only if the moving party shows that: (1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public

[97] Proposed Order (Doc. 46-4) at 3.

[98] *Benisek v. Lamone*, 138 S. Ct. 1942, 1943 (2018) (citing *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7, 24 (2008)).

interest."[99] If the Plaintiffs fail to satisfy just one of these elements, the motion for preliminary injunctive relief must be denied.

Plaintiffs do not argue that they are substantially likely to succeed on their breach of contract, fraud, negligent misrepresentation, or other legal claims, because, of course, that would be irrelevant. As explained above, an asset freeze must be tied to a claim for *equitable* relief.

Plaintiffs lodged two purportedly equitable claims: (1) their claim for equitable relief under ERISA § 502(a)(3), and (2) their claim for unjust enrichment. Plaintiffs have failed to show they are substantially likely to prevail on either of these motions.

1. Plaintiffs are not substantially likely to prevail on their ERISA claim.

As explained above, to succeed on their ERISA claim, Plaintiffs must prove that they seek appropriate equitable relief.[100] Because Plaintiffs cannot identify a segregated corpus of money that was wrongfully transferred to defendants, their ERISA § 502(a)(1) claim must be dismissed.[101]

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[99] *Sierra Club v. Atlanta Reg'l Comm'n*, 171 F. Supp. 2d 1349, 1356 (N.D. Ga. 2001).

[100] *See Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc*., 530 U.S. 238, 252, (2000).

[101] *Montinele*, 136 S. Ct. at 656.

Moreover, the underlying basis for Plaintiffs' ERISA § 502(a)(1) claim is not supported by the only evidence Plaintiffs have proffered. According to Plaintiffs, the language of each ERISA Plan establishes an equitable lien over all overpayments to providers, including Chestatee.[102] They offer one Plan as an example, but the language in that Plan belies their argument.

"ERISA-plan provisions do not create constructive trusts and equitable liens by the mere fact of their existence; the liens and trusts are created by the agreement between the parties to deliver assets."[103] As the Supreme Court stated long ago, an equitable lien is created when "the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security."[104]

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[102] Asset Freeze Br. at 15-16, n.28. The Hospital Defendants moved to dismiss the ERISA § 502(a)(3) claim because Plaintiffs failed to identify any Plan terms whatsoever.

[103] *Cent. States, Se. & Sw. Areas Health & Welfare Fund ex rel. Bunte v. Health Special Risk, Inc.*, 756 F.3d 356, 365 (5th Cir. 2014).

[104] *Walker v. Brown*, 165 U.S. 654, 664–65 (1897).

"Accordingly, the plan document itself must be examined to determine whether its language creates an equitable lien."[105]

In *Montanile*, for example, the plan language stated that "[a]mounts that have been recovered by a [participant] from another party are assets of the Plan."[106] Thus, under the Plan, the moment a participant recovered settlement funds, those funds belonged to the Plan. For this reason, the court held that the claim was an equitable one (although it went on to reject the plaintiff's argument that the remedy sought was equitable).

In contrast, one district court reviewed plan language like the provisions Plaintiffs identify and held that the Plan did not create an equitable lien.[107] In *Connecticut General Life Insurance Co. v. Advanced Surgery Center of Bethesda, LLC*, the plaintiffs—insurers and administrators of employee health and welfare benefit plans—brought a § 502(a)(3) claim against several providers to recover over $20 million in claim payments, alleging that the providers had engaged in an unlawful billing scheme involving "grossly inflated, phantom 'charges.'"[108] The

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[105] *Connecticut Gen. Life Ins. Co. v. Advanced Surgery Ctr. of Bethesda, LLC*, No. CIV.A. DKC 14-2376, 2015 WL 4394408, at *9 (D. Md. July 15, 2015).

[106] 136 S. Ct. at 655.

[107] *Connecticut Gen. Life Ins. Co.*, 2015 WL 4394408, at *9.

[108] *Id.* at *1-2.

court reviewed the Plan language governing overpayments, which provided, "When an overpayment has been made by Cigna, Cigna will have the right at any time to: recover that overpayment from the person to whom or on whose behalf it was made; or offset the amount of that overpayment from a future claim payment."[109] The court concluded that while this language "may grant the Cigna entities a contractual right to recoupment of *some* funds from a plan member to whom or on whose behalf an overpayment was made," the language did not clearly "create[] an equitable lien or constructive trust on every overpayment of benefits made by a Cigna entity to a provider."[110] In contrast, the Plan's subrogation provisions made clear that the Plan had a "lien" over any payments (such as through a tort settlement) made to plan members to compensate for an injury.[111] For these reasons, the court held that the Plan did not create an equitable lien on overpayments.

The Plan language Plaintiffs identify is similar to the language in *Connecticut General Life* and stands in stark contrast to the clear language establishing an equitable lien in *Montanile*. Unlike in *Montanile*, the Plan does not

[109] *Id.* at *8.

[110] *Id.* at *9.

[111] *Id.*

provide that overpayments are the "assets of the Plan," or indicate that the Plan has a lien on such overpayments.[112] Instead, like the language in *Connecticut General Life*, the Plan states only that it has the right to recover payments made in error.[113] The Plan further restricts this right in [redacted]"[114] Plaintiffs also point to a reference in a section of the Plan entitled [redacted] that warns participants that any [redacted]"[115] Given the context, it is clear that this provision applies to fraudulent statements of the *participant*, not alleged fraudulent statements of the provider. And in any event, this provision does not establish an equitable lien on such payments.

Moreover, when the Plan wanted to create an equitable lien, it knew how to do so. In the section governing the Plan's subrogation and reimbursement rights,

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[112] Plaintiffs do not direct the Court to any particular provision of the Plan, so the Hospital Defendants identified those provisions Plaintiffs presumably refers to in their Asset Freeze Brief. Asset Freeze Br. at 10 (citing Iacovelli Decl. Ex. D).

[113] Iacovelli Decl. Ex. D at 69.

[114] *Id.*

[115] *Id.* at 55; *see also id.* at 70.

the Plan provides that when the [redacted]

[redacted]"[116] The Plan further states that it has an [redacted] on a portion of the recovery. The Plan has no similar language regarding the type of overpayments Plaintiffs allege occurred in this case. Accordingly, Plaintiffs cannot succeed on their ERISA claim premised on Plan language, and the Court should deny the Asset Freeze Motion.

2. *Plaintiffs fail to show likelihood of success on their unjust enrichment claim.*

Plaintiffs are also unlikely to succeed on their unjust enrichment claim because they have an adequate remedy at law , such that the claim should be dismissed. "The theory of unjust enrichment applies *when there is no legal contract* and when there has been a benefit conferred which would result in an unjust enrichment unless compensated."[117] In other words, where "[a] legal

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[116] *Id.*

[117] *Tidikis v. Network for Med. Commc'ns & Research LLC*, 274 Ga. App. 807, 811, 619 S.E.2d 481, 485 (2005) (emphasis added).

contract governs the dispute," the plaintiff "may not rely on unjust enrichment."[118] This rule arises from the general principle that an equitable claim fails "if the complainant has a remedy at law which is 'adequate.'"[119] And as a matter of law, where an express contract exists governing the dispute, the plaintiff has an adequate remedy at law precluding claims for unjust enrichment.[120]

Plaintiffs seek to recover monies paid under three contracts between BCBS Georgia and Chestatee. It is immaterial that these claims are lodged against parties who are not signatories to the contracts. In *Tidikis v. Network for Medical Communications & Research LLC*, for example, the Georgia Court of Appeals dismissed a former employee's unjust enrichment claim lodged against both his former employer (with which he had a contract) and the individual founders of the

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[118] *Bonem v. Golf Club of Georgia, Inc.*, 264 Ga. App. 573, 579, 591 S.E.2d 462, 467-68 (2003).

[119] *See Mayor of Wadley v. Hall*, 261 Ga. 681, 682, 410 S.E.2d 105, 106 (1991) (citing O.C.G.A. § 23-1-4); *accord Mitsubishi*, 14 F.3d at 1518 (11th Cir. 1994) ("It is axiomatic that equitable relief is only available where there is no adequate remedy at law.").

[120] *Arko v. Cirou*, 305 Ga. App. 790, 797, 700 S.E.2d 604, 608-09 (2010); *Tidikis*, 274 Ga. App. at 811, 619 S.E.2d at 485; *Berg v. Nat'l Asset Mgmt. Agency*, No. 2:11-CV-00236-WCO, 2012 WL 13018419, at *12 (N.D. Ga. July 6, 2012) (dismissing unjust enrichment claim where the plaintiff failed to allege that a breach of an employment contract was an inadequate remedy at law); *Validsa, Inc. v. PDVSA Servs., Inc.*, 424 F. App'x 862, 870 (11th Cir. 2011).

employer-company (with whom he did not).[121] The employee alleged that when his employer fired him, he was divested of his stock options and other benefits, and as a result, both the employer and the founders were unjustly enriched.[122] The court observed that "any benefit conferred on the defendants was triggered by a provision in the contract, the validity of which neither [the plaintiff] nor the defendants challenge."[123] Because the express contract governed his termination dispute, the court affirmed the dismissal on the pleadings of the plaintiff's equitable claim arising out of the same termination.[124] Likewise, BCBS Georgia's unjust enrichment claim fails because any benefit conferred on the Defendants was triggered by a provision in the contracts authorizing payment for claims submitted, the validity of which no one contests.[125]

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[121] 274 Ga. App. at 811, 619 S.E.2d at 485.

[122] *Id.* at 807, 619 S.E.2d at 483.

[123] *Id.* at 811, 619 S.E.2d at 485.

[124] *Id.*; *see also Berg*, 2012 WL 13018419, at *12 (dismissing unjust enrichment claim against non-signatories to a contract because "[t]he complaint does not sufficiently dispel the conclusion that an adequate remedy at law—namely a suit for breach of contract against [another party]—exists").

[125] Plaintiffs erroneously argued in their response to the motion to dismiss that the "benefits" received by the Hospital Defendants "were triggered by their fraudulent scheme, not the Contracts." Memoorandum of Law in Opposition to the Hospital Defendants' Motion to Dismiss (Doc. 43) at 16. The *only* reason BCBS Georgia made any payments to the Hospital Defendants in the first place was the existence of contracts between the parties. To the extent Plaintiffs have a fraud claim here, it

Although the BCBS Affiliates were not parties to these contracts and thus cannot pursue contractual remedies against the defendants, their right to recover overpayments still depends on BCBS Georgia's enforcement of these contractual rights. In other words, only if BCBS Georgia prevails on its breach of contract or fraud claims against the Hospital Defendants could the BCBS Affiliates recover any overpayments, and even then, they would recover those overpayments *from BCBS Georgia*, not the Hospital Defendants. Indeed, as Plaintiffs alleged, the BCBS Affiliates have a licensing arrangement with BCBS Georgia under which BCBS Georgia pays Chestatee's claims and then "reconcile[s] the cost of the services billed by Chestatee with the" relevant Affiliate.[126] Plaintiffs make no effort in their Asset Freeze Motion to explain why their remedies under the licensing agreement are inadequate, and yet they seek to freeze over $100 million in assets on the assumption that they will ultimately have no legal remedy.

Even putting aside the licensing agreement between the BCBS Affiliates and BCBS Georgia, the BCBS Affiliates have also expressly lodged legal claims against the Hospital Defendants, and make no effort to explain why these legal

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is solely based on the alleged abuse of those existing contract. In other words, if Plaintiffs' billing practices did not violate the contract, there would be no fraud.

[126] Second Amended Compl. ¶ 64 and n.2; *see also id.* ¶ 61 (alleging that Plaintiffs are licensees of the Blue Cross and Blue Shield Association).

remedies are inadequate. Plaintiffs brought breach of contract claims against Chestatee under the HMO Georgia, Inc. Hospital Agreement and the Participating Hospital Agreement, arguing that they are third-party beneficiaries.[127] They also brought fraud claims against all defendants relating to payment under all three contracts.[128] Plaintiffs clearly pursue legal claims seeking legal relief. Thus, they are unlikely to succeed on their unjust enrichment claim.

C. The Court should deny the Asset Freeze Motion because Plaintiffs have not exercised reasonable diligence.

The Supreme Court recently reaffirmed that, even if a party can show it is substantially likely to succeed on the merits, the Court should deny a motion for preliminary injunctive relief where the party failed to show "reasonable diligence."[129] As one court has observed, "unexplained delay may 'standing alone, ... preclude the granting of preliminary injunctive relief ... because the failure to act

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[127] Second Amended Compl. Counts I and II.

[128] *Id.* Count V. Plaintiffs may argue that they properly pled unjust enrichment in the alternative to their legal claims. Even if that were so, pleading in the alternative is one thing; awarding extraordinary relief based on alternative pleading is another. Plaintiffs cannot show they are substantially likely to succeed on the merits of their unjust enrichment claim unless they show they likely have no adequate legal claims. And of course, Plaintiffs have not done that.

[129] *Benisek*, 138 S. Ct. at 1944.

sooner undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury."[130]

For the past year, BCBS Georgia has had many opportunities to redress what it now claims is fraud and what it now says creates an urgent need to freeze all Defendants' assets. BCBS Georgia saw a spike in UDT billing in the fall of 2016 but, according to Plaintiffs, did not reach out to Chestatee to explore this spike and initiate an audit until February 2017.[131] After its investigator received the audit results and determined that Chestatee was billing for laboratory services performed at Reliance, BCBS Georgia made no effort to recoup purportedly improper payments.[132] Nor did BCBS Georgia indicate that it believed Chestatee's billing practice was fraudulent. Instead, BCBS Georgia simply told Chestatee it was placing it on pre-payment review and directed Chestatee to provide medical

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[130] *U.S. Bank Nat'l Ass'n v. Turquoise Props. Gulf, Inc.*, No. CIV.A. 10-0204, 2010 WL 2594866, at *4 (S.D. Ala. June 18, 2010) (quoting *Tough Traveler, Ltd. v. Outbound Prods.*, 60 F.3d 964, 968 (2d Cir. 1995)); *see also Kansas Health Care Ass'n v. Kansas Dep't of Social & Rehab. Servs.*, 31 F.3d 1536, 1543-44 (10th Cir. 1994) ("[D]elay in seeking preliminary relief cuts against finding irreparable injury."); *Oakland Tribune, Inc. v. Chronicle Publ'g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) ("Plaintiff's long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm").

[131] Iacovelli Decl. ¶¶ 21, 29.

[132] *See* Durall Decl. ¶ 19 and Ex. B; Iacovelli Decl. Ex. C at 2.

records to support its claims.[133] For the next six months, Chestatee fully complied with its new obligations under pre-payment review.[134] BCBS Georgia paid Chestatee's laboratory claims at the same rates it had been prior to the pre-payment review.[135] At no point during this time did BCBS Georgia seek to recover overpayments or tell Chestatee that its billing practices were inappropriate.

Plaintiffs have identified no material facts that have changed since it placed Chestatee on pre-payment review over a year ago, and yet they now seek an emergency TRO to freeze all Defendants' assets. Apparently, Plaintiffs' only basis for seeking this relief is their concern that Reliance has been closed since June and Chestatee will close later this month. But if Plaintiffs were truly concerned about recovering supposedly millions of dollars in overpayments, they would have exercised their option to seek such recovery long ago. Plaintiffs' delay undermines their claim of exigency and warrants denial of their Asset Freeze Motion.

II. The Court should deny Plaintiffs' Extraordinary Preservation Motion.

Plaintiffs urge the Court to enter an order directing the Hospital Defendants to maintain all other evidence that may be relevant to this dispute. The Court should deny this motion as unnecessary. Under Georgia law, the Hospital

[133] Iacovelli Decl. ¶ 44; Durall Decl. Ex. B.

[134] Durall Decl. ¶ 20.

[135] *Id.*

Defendants already have a duty to preserve evidence once they received notice of this litigation.[136] Courts do not enter orders simply reminding the parties of their preexisting obligations, because such orders "serve no purpose."[137]

Plaintiffs argue, however, that the Court should enter an order reminding the Hospital Defendants of their duty to preserve evidence because (1) Reliance recently closed, (2) Chestatee is scheduled to close in a few days, and (3) counsel for the Hospital Defendants have not provided "satisfactory assurance that the materials will be maintained."[138] These facts do not justify entering an unnecessary order reminding the Hospital Defendants of their preservation duties.

Moreover, as demonstrated in the declarations of Jonathan Wright and Jaquanda Smith, the Hospital Defendants have taken adequate steps to ensure

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[136] *Silman v. Assocs. Bellemeade*, 286 Ga. 27, 28, 685 S.E.2d 277, 278 (2009).

[137] *Lawson v. Life of S. Ins. Co.*, 738 F. Supp. 2d 1376, 1383 (M.D. Ga. 2010); *see, e.g.*, *Amerimax Bldg. Prods., Inc. & Euramax Int'l, Inc., v. Gregory R. Garza*, No. 1:12-CV-861-TCB, 2012 WL 12960824, at *1 (N.D. Ga. Apr. 30, 2012) (holding that because parties to the litigation have a duty to preserve evidence, there is no need for an order saying as much); *Harper v. Redwood Toxicology*, No. 1:13-CV-721, 2013 WL 12109525, at *1 (W.D. Mich. Nov. 6, 2013) ("A court order would add nothing to the duties that the litigants already have to preserve evidence."); *see also* 8B Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ. § 2284.1 (3d ed. 2018) (noting that courts are "sparing in entering such orders").

[138] Asset Freeze Br. at 24.

relevant evidence is preserved. Mr. Wright operates a consulting company that provides IT services to Chestatee and Reliance.[139] He testified as follows:

- After Chestatee closes on July 26, 2018, the information stored on Chestatee's primary health care management system will be migrated to a database where it will be retained for at least the next seven years.[140]
- Information on Chestatee's shared drives and email servers will be backed up to a secure storage location.[141]
- The hard drives of all desktop computers used at Chestatee will be reviewed and all documents and emails saved to those drives will be preserved.[142]
- In spring 2018, Reliance's backed up and preserved its data in light of its impending closure.[143]
- After Reliance closed, its network shared drive was backed up onto a dedicated server. All auto-delete policies were disabled.[144]
- The desktop workstation computers at Reliance remain at the facility and have not been repurposed.

Ms. Smith was an office manager for Reliance and Mr. Durall's assistant in regards to matters at Chestatee.[145] She testified that Reliance uses a cloud-based

[139] Declaration of Jonathan Wright ("Wright Decl.") attached hereto as Exhibit D ¶¶ 5, 10.

[140] *Id.* ¶ 8.

[141] *Id.* ¶ 9.

[142] *Id.*

[143] *Id.* ¶ 11.

[144] *Id.*

system for preserving information, and that under current contracts, such data will be preserved for at least two years from Reliance's date of closure.[146] Plaintiffs have put forth no evidence to show a threat of spoliation. Accordingly, the Court should deny their Extraordinary Preservation Motion.

III. The Court should deny Plaintiffs' Expedited Discovery Motion.

Under the Local Rules of this Court, discovery does not commence until a defendant files an answer.[147] Plaintiffs ask this Court to waive this local rule and allow expedited discovery into two broad categories of information: (1) tracing allegedly improper overpayments and (2) ensuring that the Hospital Defendants have taken adequate steps to preserve evidence. They also ask this Court to authorize discovery into a nebulous category of information involving any factual aspect of Plaintiffs' case that the Hospital Defendants challenge in their opposition to the Asset Freeze Motion.

Courts authorize expedited discovery only upon a showing of good cause.[148] "[E]xpedited discovery is not the norm; it is an exception, to be afforded under the

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[145] Declaration of Jaquanda Smith ("Smith Decl.") attached hereto as Exhibit E ¶¶ 5, 9.

[146] *Id.* ¶ 13.

[147] LR 26.2A, NDGa.

[148] *See, e.g.*, *Procaps S.A. v. Patheon, Inc.*, No. 12-24356-CIV, 2012 WL 12845604, at *3 (S.D. Fla. Dec. 21, 2012).

court's discretion only when (assuming the court order exception is at issue) the movant establishes good cause."[149] Courts generally consider several factors to determine whether the good cause standard is satisfied including: "(1) whether a motion for preliminary injunction is pending; (2) the breadth of the requested discovery; (3) the reason(s) for requesting expedited discovery; (4) the burden on the opponent to comply with the request for discovery; and (5) how far in advance of the typical discovery process the request is made."[150] But a pending motion for preliminary injunction does not automatically satisfy the good cause standard, particularly where the Court should deny the motion.[151] And courts will not authorize expedited discovery in any event "[i]n the absence of a clear discovery request."[152]

Plaintiffs completely fail to satisfy this good cause standard. Plaintiffs' primary basis for seeking expedited discovery is their effort to obtain an asset freeze. They explain that they need to show that their ERISA § 502(a)(3) claim seeks to recover a specific, identifiable corpus of funds and argue that, to do so,

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[149] *Id.* (internal quotation marks omitted).

[150] *GTO Access Sys., LLC v. Ghost Controls, LLC*, No. 4:16CV355-WS/CAS, 2016 WL 4059706, at *4 (N.D. Fla. June 20, 2016), *report and recommendation adopted*, No. 4:16CV355-WS/CAS, 2016 WL 4059676 (N.D. Fla. July 27, 2016).

[151] *Id.*

[152] *Id.*

they need discovery to determine "whether, and to what extent, [the Hospital Defendants] have dissipated (and likely will further dissipate) the assets wrongfully taken."[153]

Plaintiffs' own evidence, however, shows that their ERISA § 502(a)(3) claim fails right out of the gate and that no amount of discovery will change that. Unlike in typical § 502(a)(3) claims where there is one specific sum of money, such as a settlement award deposited into a specific, segregated account, here Plaintiffs demand the return of unidentified overpayments in an unidentified sum. Even according to Ms. Smallwood, funds collected for the allegedly improper labs went into Chestatee's general fund. And Mr. Durall further confirmed that these funds were commingled with other monies collected from BCBS Georgia as well as other payors. The moment these funds were collected and commingled with Chestatee's general funds, any prospect of pursuing a § 502(a)(3) claim vanished.

Plaintiffs' only other basis for expedited discovery is their unfounded belief that the Hospital Defendantals have failed to take steps to preserve evidence. As explained above in Part II, Plaintiffs have offered no evidence to suggest that the

[153] Memoorandum of Law in Support of Plaintiffs' Motion for Expedited Discovery ("Expedited Discovery Br.") (Doc. 48-1) at 11.

Hospital Defendants are not preserving evidence appropriately. Absent such evidence, there is no reason to authorize expedited discovery on this topic.

Finally, this Court should deny Plaintiffs' Expedited Discovery Motion for the additional reason that Plaintiffs have failed to submit specific discovery requests. Instead, they ask for the right to serve interrogatories and requests for production of documents generally relating to these two topics and the opportunity to depose each defendant for up to four hours, without any clear limitation whatsoever.

CONCLUSION

Plaintiffs demand extraordinary, emergency relief in the form of an order freezing substantially all Defendants' assets, but they fail to tie their request to a specific, identifiable corpus of funds as they must do under binding case law. They also ask this Court to ignore their lack of diligence in pursuing the return of alleged overpayments, but Plaintiffs' delay should not be this Court's emergency. For the reasons explained above, the Court should deny the Asset Freeze Motion, Extraordinary Preservation Motion, and Expedited Discovery Motion.

Respectfully submitted this 23rd day of July, 2018.

Signature continues on the next page.

Respectfully submitted this 23rd day of July, 2018.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared with one of the font and point selections approved by the Court in LR 5.1(C), U.S.D.C., Northern District of Georgia, specifically, Times New Roman, 14 point.

This 23rd day of July, 2018.

BONDURANT MIXSON & ELMORE LLP

/s/ H. Lamar Mixson
H. Lamar Mixson, Esq.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this day I filed the foregoing THE HOSPITAL DEFENDANTS' CONSOLIDATED OPPOSITION TO PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND MOTION FOR EXPEDITED DISCOVERY using the Court's CM/ECF system which will automatically send an electronic copy of same to all parties of record.

This 23rd day of July, 2018.

BONDURANT MIXSON & ELMORE LLP

/s/ H. Lamar Mixson
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Georgia Bar No. 514012

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BLUE CROSS AND BLUE SHIELD OF GEORGIA, INC., ET AL.,

Plaintiffs,

v.

DL INVESTMENT HOLDINGS, LLC f/k/a DURALL CAPITAL HOLDINGS, LLC d/b/a CHESTATEE REGIONAL HOSPITAL; RELIANCE LABORATORY TESTING, INC.; MEDIVANCE BILLING SERVICE, INC.; AARON DURALL; JORGE PEREZ; and NEISHA CARTER ZAFFUTO,

Defendants.

CIVIL ACTION FILE NO.

1:18-cv-01304-MLB

DECLARATION OF LISA ZINI

1. My name is Lisa L. Zini, and I make this declaration voluntarily and pursuant to 28 U.S.C. § 1746 for use in connection with the above-captioned action and all other purposes permitted by law. I am over the age of 21 years, am under no legal disability, and am otherwise fit and competent to make this declaration. This declaration is based on my personal knowledge.

Training and Experience

2. In 1992, I graduated from the Cumberland School of Technology in Baton Rouge, Louisiana with a Medical Laboratory Technician diploma. Shortly thereafter, I passed an examination to obtain an MLT/ASCP certification (Medical Laboratory Technician certification from the American Society for Clinical Pathology). In 2007, I earned an MT/AAB certification (Medical Technologist certification from the American Association of Bioanalysts).

3. After working for Louisiana Reference Laboratories (an independent reference laboratory in Baton Rouge, Louisiana) for several years, I accepted a position as a laboratory technician in the lab department at Chestatee Regional Hospital ("Chestatee") in 2002. In May 2015, I was promoted to the position of Laboratory Manager at Chestatee, and I currently hold that position. In that role, I am responsible for managing overall laboratory operations, including: (1) maintaining a safe and secure laboratory environment; (2) scheduling lab employees to satisfy departmental needs; (3) maintaining validated and certified laboratory equipment; (4) implementing and maintaining procedures to assure accurate and consistent test results; and (5) overseeing laboratory information systems to ensure lab orders and specimens are properly received and logged and lab results are accurately collected, recorded, and communicated.

4. At no time during my sixteen-year tenure at Chestatee have I been asked by any of the hospital's former or present owners, executives, managers, employees, or business partners to engage in any conduct that I considered improper or unethical, and I would not have done so if asked.

Chestatee Lab's Historical Performance of Tests for Non-Hospital Patients and Use of Reference Labs

5. Since I started working in Chestatee's laboratory department in 2002, the lab has consistently conducted tests ordered by physicians employed outside of the hospital for patients receiving care in their homes or facilities entirely unrelated to Chestatee or its affiliated clinics. Examples include tests ordered for residents at skilled nursing facilities (*e.g.*, Chelsey Park Health & Rehabilitation and Gold City Convalescent Center) and patients of home health agencies (*e.g.*, Tugaloo Home Health Agency). In an average year prior to 2016, Chestatee's laboratory department received and performed hundreds of tests ordered for patients who had received no care at, or from, Chestatee in connection with the tests. Upon receipt of these specimens and orders, Chestatee's lab department enters the patient and requisition information into the hospital's MEDHOST system, Chestatee's primary clinical, financial, and medical records platform. After each of these test are completed, the results are entered into MEDHOST and finalized by the laboratory.

Then, the MEDHOST system "drops" charges (which, in my understanding, submits them for processing by Chestatee's billing department) related to the laboratory test, and the final results are sent to the ordering physician.

6. Throughout my tenure at Chestatee, the hospital has also routinely sent specimens to independent reference laboratories when the hospital's laboratory department was not capable of performing the ordered test or the test could simply be more efficiently performed elsewhere. Other than Chestatee Lab's work with Reliance Laboratory, the independent reference laboratory Chestatee has most commonly sent such tests to over the last decade is a Quest Diagnostics ("Quest") facility in Tucker, Georgia. Quest has limited access to Chestatee's MEDHOST system, and after Quest completes each test received from Chestatee, the results are entered into MEDHOST and finalized by Quest. Then, the MEDHOST system "drops" charges (which, in my understanding, submits them for processing by Chestatee's billing department) related to the laboratory test, and the final results are sent to the ordering physician.

7. While my responsibilities at Chestatee do not extend to billing operations, it has always been my understanding that Chestatee has historically issued bills to insurance companies and other payors for (1) tests ordered by Chestatee's laboratory department for patients receiving care entirely outside the

Chestatee system; and (2) tests conducted by Quest and/or other independent reference labs at Chestatee's direction.

Chestatee Lab's Urine Drug Testing Since Mid-2016

8. After Chestatee was purchased in mid-2016, the laboratory department began receiving higher numbers of urine specimens and accompanying orders for the lab to conduct "screening" tests on the samples. While the volume of urine drug "screening" tests ordered from, and conducted by, Chestatee's lab increased substantially in the months following the hospital's 2016 purchase, the Chestatee lab had fully operational equipment in its facility capable of performing those tests. I am not aware of the Chestatee lab failing to conduct tests ordered on any urine specimens received by the hospital, and I believe the lab appropriately performed, recorded, and communicated results for every urine specimen it received.

9. Before late July 2017, urine drug "screening" tests were exclusively performed on one of Chestatee's two primary chemistry analyzer machines (model: Siemens Dimension EXL with LM), which were capable of running eight tests "panels" on urine specimens. Thereafter, Chestatee exclusively ran urine drug tests on a more recently acquired chemistry analyzer machine (model: Beckman Coulter AU640), that was capable of running 27 test "panels" on each

urine specimen and more easily integrated with the laboratory information system in which the urine drug testing orders had been entered.

10. While the Chestatee lab received the AU640 machine in early 2017, the machine was not used for testing in the lab until late July 2017 because it had to first be decontaminated and independently validated for accuracy and consistency of its results. The AU640's implementation was also delayed due to software integration challenges.

Kelly Smallwood

10. While Kelly Smallwood was previously employed in an administrative (primarily billing) role at Chestatee, she was not involved in any of the hospital's clinical laboratory functions, and she would not have obtained substantial knowledge of how the lab operated from her position. For instance, Smallwood would not know how specimens were labeled, routed, and loaded, how orders and requisitions were recorded, and how the relevant laboratory information systems were used to track, log, and record results.

11. Moreover, while Smallwood may have briefly entered the Chestatee lab on a very few occasions before leaving the hospital, she would not have had sufficient access to the lab to draw any reasonable conclusions regarding the

number of urine drug tests being performed in the laboratory during any particular period.

Jorge Perez

12. I met Jorge Perez at Chestatee in late 2016 or early 2017. I do not believe Perez was ever employed by Chestatee, and I have no recollected of Perez having any formal role or actual authority at the hospital at any time.

13. Perez was primarily present at Chestatee during a multi-week period in early 2017, during which time he unsuccessfully tested a new clinical and electronic medical record system at the hospital. The system Perez tested was never implemented, and I do not recall seeing Perez at the Chestatee since that period in early 2017.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed in Lumpkin County, Georgia on this 22nd day of July, 2018.

Lisa L. Zini

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BLUE CROSS AND BLUE SHIELD OF GEORGIA, INC., ET AL., **Plaintiffs,** **v.** **DL INVESTMENT HOLDINGS, LLC f/k/a DURALL CAPITAL HOLDINGS, LLC d/b/a CHESTATEE REGIONAL HOSPITAL; RELIANCE LABORATORY TESTING, INC.; MEDIVANCE BILLING SERVICE, INC.; AARON DURALL; JORGE PEREZ; and NEISHA CARTER ZAFFUTO,** **Defendants.**	**CIVIL ACTION FILE NO.** **1:18-cv-01304-MLB**

DECLARATION OF AARON DURALL

I, Aaron Durall, pursuant to 28 U.S.C. 1746, hereby declare as follows:

1. My name is Aaron Durall, and I make this declaration voluntarily for use in connection with the above-captioned action and all other purposes permitted by law. I am over the age of 21 years, am under no legal disability, and am otherwise fit and competent to make this declaration. This declaration is based on my personal knowledge.

2. I am an attorney, licensed to practice in Florida, Georgia, and Washington, D.C. In the 16 years I have been licensed, I have had no disciplinary issues.

3. Prior to becoming an attorney, I graduated from the University of Central Florida with a Bachelor of Science degree in Accounting. Upon graduation, I obtained employment with All Professional Home Care, a home health agency that provided Registered Nurse, Licensed Practical Nurse, and Certified Nursing Assistant services to patients in need of home health care services. I worked at All Professional Home Care for approximately three years, leaving in good standing as its CFO. I then returned to school and obtained my law degree from Nova Southeastern University Law School.

4. I am the President of Reliance Laboratory Testing, Inc. ("Reliance"), which was based in Sunrise, Florida. Reliance was incorporated in June 2014 and the office licensure for the laboratory was obtained in October 2014. I ran the day-to-day operations of the laboratory until it closed in June 2018.

5. In June 2016, I entered into negotiations with Sunlink Corporation's CEO, Robert Thornton, to purchase Chestatee Regional Hospital ("Chestatee"), a hospital that Sunlink owned in Dahlonega, Georgia. I understood that Chestatee had been struggling financially, and there were concerns that Sunlink might close

the hospital. Sunlink had given notice that it was closing North Georgia Medical Center, a full service hospital in Elijah, Georgia, and that it would be replaced with an emergency room operated by a hospital in nearby Jasper, Georgia. See http://www.georgiahealthnews.com/2016/06/er-replace-full-service-ellijay-hospital. At the time, I understood that Mr. Jim Yarborough was assisting Sunlink in attempting to procure additional lines of revenues that Chestatee needed to remain open.

6. I am the sole member of Durall Capital Holdings, LLC ("Durall"). On or about August 19, 2016, Durall closed on the purchase of the assets of Chestatee. Durall purchased the hospital without any monetary or business assistance from Mr. Jorge Perez. Since the purchase through today, Mr. Perez has made no investment in Durall or Chestatee. He has had no involvement whatsoever with Chestatee's management or operations, and he has had no involvement in decisions affecting Chestatee. He was never employed or paid by the hospital.

7. After purchasing Chestatee, I replaced the existing CEO with Mr. Yarborough. Following a disagreement over his responsibilities as CEO, Mr. Yarborough resigned approximately three weeks into his tenure, and I became the new CEO.

8. Chestatee is located approximately one hour north of Atlanta in the North Georgia mountains off of Georgia 400. I tried to work at Chestatee at least twice a month, staying in Atlanta for approximately 3 or 4 days and commuting daily to the hospital in Dahlonega. I would fly commercial, typically Delta or Southwest between Ft. Lauderdale-Hollywood International Airport and Atlanta Hartsfield-Jackson International Airport, and I would drive a rental car to Chestatee. On one occasion, a friend offered to fly me, Neisha Zaffuto and Jay Smith, free of charge on a plane he had chartered for a flight from Gainesville, Georgia to an airport near Ft. Lauderdale. I accepted the offer, and we drove to Gainesville for the flight. Chestatee was never charged for the flight, which was the only time I flew on a private plane for my trips to the hospital.

9. As CEO, I met with the hospital staff to try and learn what improvements were needed and to adjust how the hospital would be operated. We hired more staff, including two hospitalists, to improve patient care. The payroll at Chestatee increased between thirty and forty percent after I purchased the hospital.

10. We also added services at the hospital. For example, Pathway To Recovery, a drug abuse recovery center, was opened. Pathway To Recovery increased jobs within the local community and assisted individuals in their quest to

become drug free and acclimate themselves back into society while being drug free.

11. After I became CEO, long-time staff at the hospital approached me and advised me that new equipment was desperately needed because the current equipment was outdated. In response, we purchased new equipment, including new beds, operating room equipment, and monitors, and installed new flooring in some of the hospital wings. I conservatively invested at least $3,000,000 to $4,000,000 for new equipment and improvements at the hospital.

12. During the time I was CEO, various employees resigned for a variety of reasons. To my knowledge, no one ever said that they were resigning because of purported fraudulent activity, as Plaintiffs allege in their motion.

13. Decisions that were made at Chestatee to improve patient care and to make the hospital run more efficiently were made by me and my management team. Traci Cowart and Cathy Stanford, long-time Chestatee employees who had worked at the hospital long before the 2016 acquisition, were integral parts of that team.

14. In April 2017, Cathy Stanford was promoted to run the day-to-day operations of the hospital as its COO, and I began visiting the hospital less frequently, approximately once a month. Reviewing the hospital mail is one of my

major tasks as CEO. After I began curtailing my visits to Chestatee, the hospital mail was sent to me in South Florida for my review.

15. Before our purchase of Chestatee, the hospital lab ran tests, including drug screens, for both patients and non-patients. Beginning in October 2016, the volume of drug screens for non-patients increased significantly, thereby helping to provide Chestatee with the funds needed to operate profitably while also improving patient care. Laboratory staff ran the tests and the results were stored on the Laboratory Information System.

16. When I purchased the hospital, the lab had two chemistry analyzers that were used to run drug screens and analyze blood specimens. Chestatee purchased new laboratory equipment during my tenure as CEO, including a new chemistry analyzer. The lab continued using the two existing machines until the new machine was installed and validated, and the staff was trained on the machine.

17. After I purchased the hospital, Chestatee hired Medivance Billing Service, Inc. ("Medivance"), a health care billing and collection company, to bill for the hospital services. Medivance is owned by a longtime acquaintance, Neisha Zaffuto. We initially engaged Medivance to bill for and submit claims for laboratory services, but later expanded its role to cover other hospital departments.

18. In February 2017, John Iacovelli of Blue Cross and Blue Shield of Georgia, Inc. ("BCBS") notified Chestatee that he was conducting an audit of services Chestatee rendered to BCBS's members, and requested Chestatee to submit the medical records for 15 BCBS members, "including all testing results, requisition forms, provider medical records and all supporting documentation." A true and correct copy of the February 20, 2017 letter from BCBS to Chestatee (redacted) is attached hereto as Exhibit A. The documentation that Chestatee submitted to BCBS for each of the 15 members, showed, among other things, (a) whether the member was a patient at Chestatee, (b) the location of the member, (c) the location of the ordering physician, (d) the screening tests that were run on the urine samples, (e) the claims Chestatee submitted, and (f) the amount BCBS paid on the claims that Chestatee submitted.

19. Subsequently, by letter dated May 5, 2017 to Chestatee's counsel, BCBS notified Chestatee that it "has completed its investigation." The letter did not accuse Chestatee of fraud. Nor did it notify Chestatee that its contract with BCBS was being terminated. Instead, the letter notified Chestatee that it was being placed on "pre-payment review," effective 15 days from the date of the letter. A true and correct copy of the May 5, 2017 letter is attached hereto as Exhibit B. Under the pre-payment review program, BCBS would review all urine drug testing

claims prior to processing the claim to determine its appropriateness. Thus, effective May 20, 2017, Chestatee was required to submit all claims by paper with accompanying documentation that included the claim form, the referring physician's order, the requisition form, and final result.

20. Beginning May 20, 2017, Chestatee complied fully with the pre-payment review program and submitted all of the required documentation. BCBS continued paying the claims submitted by Chestatee at the same rates it had been paying prior to imposing prepayment review, until November 2017.

21. Although Chestatee's contract with BCBS allowed for immediate termination "for cause," BCBS notified Chestatee that its contract with BCBS was being terminated pursuant to the ninety-day notice provision in the contract. BCBS noted that while the entire contract had to be renegotiated, only the laboratory fee schedule had to be renegotiated within the ninety-day notice period.

22. BCBS never accused Chestatee, verbally or in writing, of fraud during the negotiations, which extended over approximately three months. BCBS instead wanted Chestatee to enter into a lower fee schedule than was allowed under the current contract. We ultimately agreed to a new fee schedule, and a new contract was entered into on or about November 1, 2017.

23. Neither Reliance nor Chestatee ever paid a kick back or monetary benefit to any provider, referring physician, or drug treatment center in order to procure specimens at either facility.

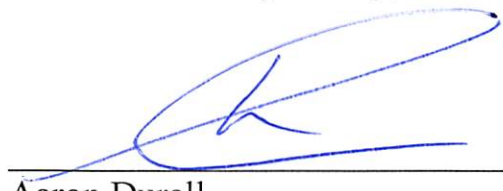
24. Neither Reliance nor Chestatee ever paid a salesperson based on the number of specimens ordered by a referring physician or treatment facility.

25. All payments BCBS made to Chestatee after it was purchased in mid-2016 would have been deposited into Chestatee's depository account in the ordinary course of business. The funds were then transferred to Chestatee's general operating account that was used for making payments on behalf of Chestatee. During any given month, in addition to deposits on payments received from BCBS, hundreds of deposits from other sources, including other insurance companies and patients, were also received and transferred to the general operating account. That account was used for paying salaries, taxes, and utilities, purchasing food for patients, equipment, and furniture, and paying other normal expenses of an operating hospital. As a result, there was never a specific, identifiable fund at Chestatee comprised of proceeds from payments BCBS made for urine "screening tests" or any other tests.

26. Currently, Chestatee has less than $250,000 in all of its accounts. Likely, none of these funds are even traceable to the last payments BCBS made to

Chestatee in November 2017 for urine drug testing. Kelly Smallwood's testimony in paragraphs 56 – 60 of her Declaration about money being wired from Chestatee accounts is false.

Executed in Fulton County, Georgia on this 22nd day of July, 2018.



Aaron Durall

EXHIBIT A

BlueCross BlueShield of Georgia

February 20, 2017

CHESTATEE REGIONAL HOSPITAL
227 MOUNTAIN DRIVE
DAHLONEGA, GA 30533
706-864-6136

To Whom It May Concern,

Anthem/Blue Cross Blue Shield of Georgia (BCBSGa) regularly reviews claims to assess the accuracy and correctness of a provider's billing/coding practice and the appropriateness of the service. As such, we are conducting an audit of services rendered by you to our members. Anthem/BCBSGa is requesting that you submit the medical records for each member listed below **for all dates of service,** including all testing results, requisition forms, provider medical records and all supporting documentation. Please send the documents requested and the complete set of medical records in one package and please avoid the use of staples. You may include any additional information or correspondence you believe is pertinent. We do not provide reimbursement for the duplication of documents in support of this request.

Please submit copies of **all requested information related to the members and dates of service identified in the chart below within 30 days** of the date of this letter to the address below. If the requested documentation is not received within 30 days, BCBSGa will not be able to verify the accuracy and correctness of the claim and/or the appropriateness of the service.

Please mail the requested documents to:

John Iacovelli
BCBSGa Special Investigations Unit
3350 Peachtree Road NE
Mailstop GAG006-0016
Atlanta, GA 30326

DOB	F. NAME	L. NAME
6/15/1971	REDACTED	
9/23/1987		
5/18/1990		
12/3/1990		
8/22/1991		
9/14/1991		
1/8/1992		
1/21/1992		
5/5/1992		
12/13/1992		

REDACTED

2/10/1993
12/15/1994
1/1/1996
9/17/1996
9/24/1997

If you have any questions regarding this request, they should be directed to me via e-mail at john.iacovelli@anthem.com.

Sincerely,

John Iacovelli
Senior Investigator
Special Investigations Unit
Blue Cross Blue Shield of Georgia (BCBSGA)
3350 Peachtree Road N.E., Mail Stop: GAG006-0016
Atlanta, GA 30326
404-842-8412

EXHIBIT B

May 5, 2017

CHRISTOPHER A. PARRELLA
LAW OFFICES OF ANTHONY C. VITALE
2333 BRICKELL AVE.
SUITE A-1
MIAMI, FL 33129
305-358-4500

Via UPS and E-mail

RE: Chestatee Regional Hospital

Dear Mr. Parrella,

Blue Cross Blue Shield of Georgia (BCBSGa) has completed its investigation, considered all of the information that you and your client provided and concluded that we will be placing Chestatee Regional Hospital (Chestatee) on pre-payment review. Under the pre-payment review program, we will review all urine drug testing claims prior to processing the claim to determine the appropriateness of the claim. This pre-payment review will include any and all existing and future NPIs and TINs associated with the provider listed above.

Chestatee will be on pre-payment review effective 15 days from the date of this letter. If there is additional information that you would like BCBSGa to consider in relation to the decision to place Chestatee on pre-payment review, you have the opportunity to discuss this decision with me and/or provide information to me within that 15 day period. If, as a result of any such additional information and/or discussion, BCBSGa determines that Chestatee will not be placed in the pre-payment review program, I will notify you of that decision.

If Chestatee is placed in the pre-payment review program, each claim Chestatee submits that seeks reimbursement for the relevant codes must also include medical records that support the billing of the specified code(s). We will then determine the accuracy and correctness of the claim and/or the appropriateness of the service based on the submitted medical records and other relevant information. Any claim that Chestatee submits thereafter that seeks reimbursement for the CPT codes at issue without the required medical records will be denied for insufficient documentation.

During the period that pre-payment review is in effect, Chestatee is not eligible to obtain a pre-determination or a prior authorization for the specified claims. These claims will be reviewed under the pre-payment review process even if the claims are not reviewed for other purposes, such as pre-authorization or predetermination, outside of the pre-payment review program. Information you may receive about the review process that applies for those claims outside of the pre-payment review program is superseded by the process that applies during pre-payment review. Additionally, if we identify concerns related to other types of claims, we reserve the right to expand the scope of the pre-payment

review to include those additional claims. You will be notified of the additional types of claims and will be required to submit medical records to support the billing of those claims as well.

Even if you do not provide any information or do not request a discussion within the next 15 days, you are welcome to provide additional information regarding your billing/coding practices to me at any time; that information will be considered during the next re-evaluation of your pre-payment review status. We will re-evaluate whether to keep you on pre-payment review at least every six months. During the six-month review process, we will consider, among other things, whether an expansion of the scope of pre-payment review was required due to changes in billing practices which raised new or additional concerns. Chestatee will remain on pre-payment review until notified otherwise.

If you have any questions, please contact me at john.iacovelli@bcbsga.com.

Respectfully,

John Iacovelli
Senior Investigator
Special Investigations Unit
Blue Cross Blue Shield of Georgia (BCBSGA)
3350 Peachtree Road N.E., Mail Stop: GAG006-0016
Atlanta, GA 30326
404-842-8412

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BLUE CROSS AND BLUE SHIELD OF GEORGIA, INC., ET AL., **Plaintiffs,** **v.** **DL INVESTMENT HOLDINGS, LLC f/k/a DURALL CAPITAL HOLDINGS, LLC d/b/a CHESTATEE REGIONAL HOSPITAL; RELIANCE LABORATORY TESTING, INC.; MEDIVANCE BILLING SERVICE, INC.; AARON DURALL; JORGE PEREZ; and NEISHA CARTER ZAFFUTO,** **Defendants.**	**CIVIL ACTION FILE NO.** **1:18-cv-01304-MLB**

DECLARATION OF NEISHA CARTER ZAFFUTO

1. My name is Neisha Carter Zaffuto, and I make this declaration voluntarily for use in connection with the above-captioned action and all other purposes permitted by law. I am over the age of 21 years, am under no legal disability, and am otherwise fit and competent to make this declaration. This declaration is based on my personal knowledge.

2. I am currently the owner and president of Medivance Billing Service, Inc. ("Medivance"). I started Medivance in 2007 to provide revenue cycle

management to businesses operating in the health care industry. We currently have more than 50 active clients.

3. Prior to starting Medivance, beginning in 2000, I was employed by health care companies in a variety of sub-specialty areas, such as cardiology, family medicine, and behavioral health, performing billing and collection tasks.

4. In August 2016, Medivance entered into a contract with Chestatee Regional Hospital to perform billing and collection services for the hospital. In order for my team to perform the billing and collection services effectively, I requested and later obtained copies of Chestatee's managed care contracts so that we would have an understanding of the contract language, provisions & exclusions, as well as payment adjudication rates.

5. Medivance initially billed and collected for the laboratory services through our proprietary software program. We later began providing billing and collection services for the other hospital departments.

6. I visited the hospital approximately once a month, with my visits typically lasting between two to four days. I always travelled commercially from Ft. Lauderdale to Atlanta, and then drove by car to Dahlonega. On one occasion, a friend of Aaron Durall offered to fly Aaron, Jay Smith, and me on a flight he had chartered from the airport in Gainesville, Georgia to an airport near Ft. Lauderdale.

We accepted the offer and drove to Gainesville from Dahlonega. The flight was provided free of charge, and Chestatee was never charged for the flight.

7. In May of 2017, Blue Cross and Blue Shield of Georgia ("BCBS") placed Chestatee on prepayment review for urine drug testing claims, which obligated Chestatee to submit to BCBS all of the medical records that supported the billing, in addition to the claim form. Because Medivance was already performing the laboratory billing services for Chestatee, my team handled the submission of all the records required for the pre-payment review. We would obtain portal access to a patient's account file, and print the requisition, the doctor's order showing medical necessity and requested frequency of the testing, the test results for the presumptive test, and, if applicable, the definitive test. We would also print the claim form and send the entire package to BCBS by certified mail. BCBS continued paying the claims submitted by Chestatee at the same rates it had been paying prior to imposing prepayment review until November 2017.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed in Fulton County, Georgia on this 22nd day of July, 2018.

Neisha Carter Zaffuto

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BLUE CROSS AND BLUE SHIELD OF GEORGIA, INC., ET AL.,

Plaintiffs,

v.

DL INVESTMENT HOLDINGS, LLC f/k/a DURALL CAPITAL HOLDINGS, LLC d/b/a CHESTATEE REGIONAL HOSPITAL; RELIANCE LABORATORY TESTING, INC.; MEDIVANCE BILLING SERVICE, INC.; AARON DURALL; JORGE PEREZ; and NEISHA CARTER ZAFFUTO,

Defendants.

CIVIL ACTION FILE NO.

1:18-cv-01304-MLB

DECLARATION OF JONATHAN WRIGHT

1. My name is Jonathan Wright, and I make this declaration voluntarily for use in connection with the above-captioned action and all other purposes permitted by law. I am over the age of 21 years, am under no legal disability, and am otherwise fit and competent to make this declaration. This declaration is based on my personal knowledge.

Education and Experience

2. I earned a bachelor degree in computer science from East Carolina University in 1997, and I received an MCSE (Microsoft Certified Systems Engineer) certification in 2001.

3. From 1997 until starting my own consulting company in 2006, I worked in software development, IT support, and network administration positions for several enterprises, including large telecommunications, manufacturing, and non-profit organizations.

4. In late 2006, I started my consulting company, The Wright Alliance Inc., d.b.a. WA Technologies, Inc. ("WA Technologies"). WA Technologies provides full-service technology, network solutions and IT consultation services for small and medium-sized business.

Preservation of Chestatee Data

5. Since late 2016, WA Technologies has been providing IT services and consulting to Chestatee Regional Hospital ("Chestatee") in Dahlonega, Georgia. While I personally oversee WA Technologies' engagement with Chestatee, the company has retained a full-time contractor (Dede Dalmeida) to provide on-site IT and networking support at the hospital's main facility in Dahlonega, Georgia.

6. As part of the Chestatee engagement, WA Technologies has been tasked with updating and streamlining various, legacy IT systems and platforms deployed at the hospital. As a result of this work, I am familiar with what data Chestatee generates and maintains in the normal course of its business.

7. After Chestatee's sale was announced and the hospital's closure was scheduled for late July 2018, WA Technologies was engaged to assist the hospital in preserving its electronic medical records and other hospital data after the hospital's closure.

8. Chestatee's primary health care management system is known as MEDHOST, which is an integrated clinical, financial, and electronic medical record system. After Chestatee closes on July 26, 2018, the information stored in MEDHOST will be migrated to a custom SQL database where it will be retained in a read-only format for at least the next seven years.

9. The information on Chestatee's networked shared drives and email server will be backed up to a secure, cloud-based storage through the Citrix ShareFile service. In addition, I have directed Dede Dalmeida to individually review the hard drives on all desktop computers used at Chestatee and preserve all documents and emails that may have been saved to those drives.

Preservation of Reliance Data

10. Since 2014, WA Technologies has been providing IT services and consulting to Reliance Laboratory Testing, Inc. ("Reliance") in Sunrise, Florida. At the outset of the engagement, I worked with Reliance to design and implement its IT network, and I was responsible for managing Reliance's network thereafter. As a result, I am familiar with what data Reliance generated and maintained in the normal course of its business.

11. In the spring of 2018, WA Technologies assisted Reliance in backing up and preserving its data in light of its impending closure. After Reliance ceased operations in late May 2018, WA Technologies backed up its network shared drive onto a dedicated server and disabled all retention/auto-delete policies on Reliance's on-site email server and separately retained a full backup of that server. To my knowledge, the 25-30 desktop workstation computers at Reliance remain at the facility and have not been repurposed.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed in Broward County, Florida on this 22nd day of July, 2018.

Jonathan Wright

Jonathan Wright

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BLUE CROSS AND BLUE SHIELD OF GEORGIA, INC., ET AL., **Plaintiffs,** **v.** **DL INVESTMENT HOLDINGS, LLC f/k/a DURALL CAPITAL HOLDINGS, LLC d/b/a CHESTATEE REGIONAL HOSPITAL; RELIANCE LABORATORY TESTING, INC.; MEDIVANCE BILLING SERVICE, INC.; AARON DURALL; JORGE PEREZ; and NEISHA CARTER ZAFFUTO,** **Defendants.**	**CIVIL ACTION FILE NO.** **1:18-cv-01304-MLB**

DECLARATION OF JAQUANDA SMITH

1. My name is Jaquanda S. Smith, and I make this declaration voluntarily and pursuant to 28 U.S.C. § 1746 for use in connection with the above-captioned action and all other purposes permitted by law. I am over the age of 21 years, am under no legal disability, and am otherwise fit and competent to make this declaration. This declaration is based on my personal knowledge.

Background and Experience

2. I earned a Bachelor of Science in hospitality management from Johnson & Wales University in Miami, Florida in 2008. In addition, I earned a Master of Business Administration from the University of Phoenix in 2014 after studying at its main Central Florida campus.

3. From 2006 through 2008—during my final two years of college—I worked as a manager trainee at Enterprise Rent-A-Car.

4. After graduating from college in 2008, I accepted a position with GEICO, where I worked in various roles and ultimately served as a claims adjuster from 2012 through 2015, the final three years I worked for the company.

5. In 2015, I accepted a position as an administrative coordinator at Reliance Laboratory Testing, Inc. ("Reliance"). In February 2016, I was promoted to the role of Reliance's office manager, a position that I held until Reliance ceased operations at the end of May 2018.

6. Since early June 2018, I have been employed as an account manager for a behavioral health care provider in Sunrise, Florida.

Work at Chestatee

7. As Reliance's office manager, I was initially responsible for overseeing human resources and employee benefits as well as managing day-to-

day interactions with Reliance's existing clients that sent orders and specimens for testing by Reliance.

8. In mid-2016, I learned that Durall Capital Holdings, LLC ("Durall Capital"), a company owned by Reliance's President and founder, Aaron Durall, purchased the assets of Chestatee Regional Hospital in Dahlonega, Georgia. Although Jim Yarborough assumed the position of Chestatee's CEO shortly after Durall Capital's acquisition, Yarborough stepped down from that role several weeks later, and Aaron Durall stepped in to fill the role of CEO at Chestatee in October, 2016.

9. As Chestatee's new CEO, Durall asked for my assistance in addressing some of the hospital's more time-sensitive management projects. For instance, given Chestatee's recent change of ownership, the hospital had to transition its employee benefits programs to new providers as well as open new accounts (often involving negotiation of new trade-credit agreements) with dozens of its vendors and trade partners.

10. During late 2016 and early 2017, I frequently accompanied Aaron Durall on his regular travels to Chestatee, which were scheduled approximately every two weeks and usually involved several workdays at the hospital during each visit. During these trips, we always booked commercial flights (usually on Delta

Air Lines or Southwest Airlines) from the Fort Lauderdale-Hollywood International Airport (FLL) to the Hartsfield-Jackson Atlanta International Airport (ATL), where we would rent a car to drive to Chestatee in Dahlonega, Georgia. On a single occasion, Durall, Neisha Zafutto (who regularly accompanied Durall and me on trips to Chestatee), and I accepted an offer from an acquaintance of Durall to ride on a flight he had chartered from an airport in Gainesville, Georgia to an airport near our final destination in South Florida. Importantly, this flight was provided as a personal courtesy and free of charge to Durall, Zafutto, and me, and Chestatee was never charged for the flight.

11. Around the end of 2016 and the beginning of 2017, I saw Jorge Perez on a few occasions during my work at Chestatee. I recognized Perez because he was a vendor of a laboratory information system that Reliance used for a number of years before selecting a replacement system in December 2017, and Perez would occasionally be present at Reliance's office to provide support on the software. Perez was at Chestatee merely in an attempt to implement a clinical or medical records system at the hospital, but he was unable to make the new system function properly and abandoned the project after several weeks of work.

12. At no time have I ever heard that Perez worked for, received payments from, invested in, had authority over, or played any role in the

management or operation of Chestatee or any of its departments or functions. Likewise, I have never seen nor heard of Aaron Durall reporting to, or receiving direction from, Perez in any other context.

Preservation of Reliance's Lab Information System

13. During my tenure at Reliance, the lab used two different lab information systems ("LIS"), which are software systems in which orders are entered, specimen labels are generated, results are captured, and information about the patient, test, and results are stored. Before December 2017, Reliance's primary LIS was MedX, and Reliance began using ApolloLIMS as its LIS on or around December 4, 2017. Reliance implemented both MedX and ApolloLIMS as cloud-based solutions, and both providers have contracts to retain Reliance's data for at least two years from Reliance's date of closure at the end of May 2018.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed in Fulton County, Georgia on this 22nd day of July, 2018.

Jaquanda S. Smith